80-1827

NO.

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ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

R. G. Russ, Jr., et ux, Helen Russ

Petitioners,

vs.

State of Texas, et al,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LAW OFFICES of PHILIP R. RUSS
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R. G. Russ, Jr., et ux,
Helen Russ

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IN THE

Supreme Court of the United States

OCTOBER TERM 1981

NO.....

R. G. Russ, Jr., et ux, Helen Russ,

Petitioners,

vs.

State of Texas, by and through the State Department of Highways and Public Transportation, et al[1]

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners, R. G. Russ, Jr., et ux, Helen Russ (Russ), respectfully request that a writ of certiorari issue

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[1]Other parties United States, by and through Environmental Protection Agency, Department of Transportation, Federal Highway Administration and their agents George C. Wall, Jr., Morris Monroe, Clinton B. Spitts, Dave Williamson, A. L. Lewis, and B. L. DeBerry.

[2]435 U.S. 519 (1978)

to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on December 19, 1980 and Order overruling Petition for Rehearing entered February 3, 1981.

QUESTIONS PRESENTED

Does the judgment of the court below conflict with the decisions of this Court as set forth in *Vermont Yankee Nuclear Power Corp. v. NRDC*[2], where on the evidence of record the court below affirmed the judgment of the trial Court finding that:

1. The trial court applied the correct standard of review regarding the Environmental Impact Statement (EIS) concerning its scope and adequacy;

2. The final EIS which was prepared and filed relative to the project subject of this litigation in failing to discuss emissions, the ogallala aquifer, the long range effects of the irretrievable loss of farmland and the do nothing alternative, is adequate;

3. That the "rule of reason" is the applicable standard of review by an appellate Court with regard to the National Environmental Policies Act of 1969 (NEPA).

Whether the decision of the Fifth Circuit is in conflict with the decision of the Seventh Court of Appeals in its

decision of the case of *Swain v. Brinegar,* 517 F.2d 766 and 542 F.2d 363 (en banc) (7th Cir., 1976).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is not reported but is printed in the Appendix at page A-1. The ruling of the United States District Court for the Northern District of Texas, Lubbock Division, is not reported but is printed in the Appendix at page B-1.

JURISDICTION

The Fifth Circuit's judgment was entered on December 19, 1980, and the Petitioners' timely petition for rehearing was denied on February 3, 1981, printed in the Appendix at page D-1. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

STATUTES INVOLVED

The relevant provisions of the National Environmental Policies Act of 1969 (NEPA), as amended, (42 U.S. C. §4332), provides:

"The Congress authorizes and Directs that, to the

fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall —

(A) ***

(B) identify and develop methods and procedures, ***, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for . . . and other major Federal actions significantly affecting the quality of human environment, a detailed statement by the responsible official on —

(i) the environmental impact of the proposed action;

(ii) ***

(iii) ***

(iv) ***

(v) any irretrievable commitments of resources which would be involved in the proposed action should it be implemented;

(D) ***

(E) ***

(F) recognize the worldwide and long-range character of environmental problems, . . .;

(G) ***

(H) ***

(I) ***

STATEMENT OF THE CASE

This is an environmental action in which the peti-

tioners (Russ) landowners who reside on their farm in Hale County, Texas, along the proposed route for Interstate Highway 27 (the project) contended that the State of Texas, Department of Highways and Public Transportation (THD) and the United States Department of Transportation (DT) and the Federal Highway Administration (FHWA) failed to comply with the provisions of NEPA and that the EIS on the project is inadequate. Jurisdiction of the District Court was predicted upon 28 USC §2201-2202, being an action in which the petitioners seek declaration of their rights under NEPA, as well as 28 USC §1361, 28 U.S. C. §1331 (A) and §10 of the Administrative Procedures Act, 5 USC 701-706.

Petitioners filed their Complaint and Jury Demand in the United States District Court, Northern District of Texas, Lubbock Division, on November 28, 1978, at which time thay also filed a Motion for Temporary Injunction to halt the project. The project is a major federal action and will take some 28.805 acres of farmland out of production from petitioner's property and approximately 1500 acres out of agricultural production for the entire project. In constructing the project it will cross a 66-inch underground aquaduct on petitioners' property maintained by the Canadian River Municipal Water

Authority ("CRMWA") which respondents admit is itself a major federal action, though not discussed or analyzed in the EIS.

The project, on petitioners' property and elsewhere, crosses interconnected playa lakes, some of which may be wetlands, which are indigenous to the area. Furthermore, petitioners and other farmers in the area raise cotton and other crops immediately adjacent to the project. Respondents admit that the project will increase the number of vehicular trips on the road in question and thereby increase the emissions of sulphuric acid (H_2SO_4) from catalytic converters on vehicles traversing the project. These increased emissions will adversely affect the grade of cotton produced in the area of the project but has not been studied and analyzed by the EIS.

Respondents do not dispute that they have failed to conduct any studies to determine the "long range effects of taking agricultural farmland out of production as opposed to leaving same in production as an alternative to the project." Respondents likewise do not dispute that the "do nothing" alternative to the project has not been discussed in the EIS, other than being mentioned in a perfunctory manner.

The District Court in this case, following all parties

resting on the hearing for preliminary injunction, made Findings of Fact and Conclusions of Law and entered a take nothing Judgment on the merits on January 15, 1979. (App. B-1, C-1)

REASONS FOR GRANTING THE WRIT

The decision below raises important questions relating to the proper interpretation and application of requirements and principles established under federal environmental law descriptive of the content and adequacy of content of an environmental impact statement and the standard of review the courts are required to follow in reviewing the adequacy of an EIS.

The decision below conflicts with the decisions of this Court, and with decisions in the Fifth and other Circuit Courts of Appeal which establish the standards to be used in determining whether an EIS is adequate, the standard of review by the appellate courts in reviewing the trial courts decision, i.e., whether NEPA shall be complied with "to the fullest extend possible" or be governed by the "rule of reason."

The decision below conflicts with the decisions of this Court, and with those of the Fifth, Seventh and other Circuits stating that NEPA is an environmental "full disclosure law" which must list "all known possible

environmental consequences" and further holding that the "do nothing alternative" must be discussed. The decision conflicts with the decisions as to whether the environmental consequences must be discussed and analyzed or merely mentioned. Other circuits have stated that an EIS cannot be fragmented or segmented as it is in this case.

Review by the Court is required also to assure the maintenance of uniformity in decisions of the Courts of Appeals in the adjudication of environmental disputes.

A. The Decision Below Is In Direct Conflict With A Controlling Decision of This Court.

The Fifth Circuit's decision herein allowing the construction of the project when the EIS is (1) segmented or fragmented, (2) does not analyze or evaluate (a) the irretrievable loss of agriculturally productive lands eliminated from production of food and fiber for construction of a highway, (b) the effect of emissions on crops, (c) the effect of changes in grading lands and alteration of watersheds on the ogallala aquifer and playa lakes and (d) the do nothing alternative either in whole or in part conflicts with *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978) and *Stryker's Bay Neighborhood Council v. Karlen*, _____ U.S. _____. 62 L.Ed. 2d 433 (1980).

In *Vermont Yankee* and followed in *Stryker's Bay* the Court stated that the Court's role in a review of an agency decision relative to the environment was to "insure that the agency considered the environmental consequences." At trial herein respondents did not nor have they ever disputed that there is no discussion of the "long range effects of the irretrievable loss of agriculturally productive lands being eliminated from production of food and fiber (some 1500 acres) for construction of a highway", (2) the "do nothing alternative", (3) the effect that construction of the project will have on (a) crops growing adjacent to the project and (b) the effect of alterations in the watershed and grading of lands on playa lakes and the Ogallala aquifer. NEPA provides procedural duties (e.g., preparation of the EIS) must be complied with to "the fullest extent possible." Recognizing that this standard does not call for perfection and assuming the "rule of reason" applicable, does this mean that an EIS is adequate by simply stating that the "do nothing alternative presupposes abandoning the project" or that "no studies were conducted because any effects on the environment are self-evident or if the EIS is fragmented simply ignore same? The Fifth Circuit's decision in the case at bar clearly sanctins such a result. In spite of the dispositive facts that

the deficiencies in the EIS complained of by petitioners relative to the project are not in dispute, the trial and appellate courts held the petitioner's did not meet their burden in proving these deficiencies. If the failure to treat these issues in the EIS are admitted then they must be conclusively proved. The result is contradictory to the policy enunciated in *Vermont Yankee* and *Stryker's Bay.*

B. There Is A Conflict Among The Circuits On The Issue of Whether The Environmental Impact Statement For I-27 Is Adequate In That It Covers Only One Segment Of the Highway And Does Not Treat The Elimination Of Farmland From Production.

Calvert's Coordinating Committee v. Atomic Energy Commission, 449 F. 2d 1109, (D.C. Circuit, 1971) and *Vermont Yankee,* supra, which should have resolved once and for all the issue of whether an impact statement must be analytical, detailed, non-fragmatized or non-segmented and consider "to the fullest extent possible" all environmental considerations, have not had that effect. Instead, the lower courts have failed to apply *Calvert Cliff's* and *Vermont Yankee* uniformly, and a conflict among the circuits on an important issue of environmental law has developed.

The Fifth Circuit in its decision in this case is in con-

flict with the Seventh Circuit. *Swain v. Brinegar,* 517 F.2d 766, 542 F. 2d 363 (en banc) (7th Cir., 1976). The fact pattern of *Swain* is virtually identical to that of the instant cause but the results are contrary to each other. In *Swain* the Seventh Circuit stated it was improper to segment the project in the EIS and preparation of an EIS for the entire 42 mile project was required. The Seventh Circuit in *Swain* noted with approval that the EIS considered all the relevant environmental consequences of the proposed highway, including the taking of farmland, the increase in noise and air pollution and the harm caused by any changes in the land grading. These considerations are notably absent (with the exception of noise consideration) in the case at bar.

Calvert Cliff's states that compliance with NEPA must be more than pro forma ritual and that the Congressional command that the act be complied with to the "fullest extent possible" does not make NEPA's procedural requirements "discretionary."

The Fourth Circuit in *Arlington Coalition on Transportation, et al v. Volpe,* 458 F. 2d 1323 (4th Cir., 1972) enjoined further acquisition of right of way and construction of Arlington I-66 until the appellees ****, (2) ascertained there was "no feasible and prudent alternative" to the use of Bon Air Park ****.

The Eighth Circuit in *Robinson, et al v. Knebel,* 550 F. 2d 422 (8th Cir., 1977) held that a discussion of alternatives to the project in the EIS was sufficient if it presents sufficient information for a reasoned choice of alternatives. The decision below in the instant case conflicts with *Robinson.*

The Fifth Circuit's decision is also in conflict with several district court decisions. *Environmental Defense Fund v. Corps of Engineers of the U.S. Army,* 325 F. Supp. 728, 325 F. Supp. 749, (E.D. Ark., 1970); *Scherr v. Volpe,* 336 F. Supp. 882, (W.D. Wisc., 1971); *The Upper Pecos Association v. Stans,* 328 F. Supp. 332, (D.N.M., 1971); *Sierra Club v. Froehlke (Kickapoo River),* 345 F. Supp. 440, (W.D. Wisc., 1972).

The court below ruled that petitioners were required to establish by a preponderance of the evidence, rather than by a prima facie showing of deficiencies, that the EIS was inadequate. On the face of the EIS the "do nothing alternative" and other items are not discussed or analyzed but merely mentioned, if at all. The respondents contend that many of the environmental consequences are self-evident and do not therefore need discussion. Surely, if the cases mean what they say and no discussion of the various environmental consequences are had, including an analysis of those consequences, the inadequacy of the EIS is then conclusively established.

The Court below is shown to have refused to heed (although so urged by Russ) the principles established by the decision in *Calvert Cliff's, Swain* and *Vermont Yankee* to discuss "to the fullest extent possible" all environmental consequences. The evidence which is undisputed established the EIS inadequate on its face. In this day of ever increasing shortages, growing domestic and world population and increasing demands on agricultural production in the face of industrial expansion, highway construction and growing cities and towns it is of paramount importance to this country and the world it feeds that the long range effect of the irretrievable loss of farmland from production of food and fiber must be considered, analyzed and weighed against the utility, desirability and need, if any, of such a project as the one in question.

Finally, it is submitted that the decision below, if allowed to stand, will impair substantial uniformity in the decisions of the Circuit Courts, and cause an erosion of fundamental principles inherent in federal environmental law policy. It is respectfully submitted that the failure of the court below to apply applicable principles of law established by the decisions of this Court requires that the Court grant certiorari. The lower federal courts are getting the environmental law in this key area into a

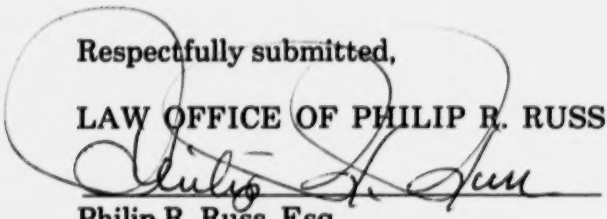
tangle of considerable proportions. Only a definitive decision by this Court will clarify the situation and permit the environmental laws to be enforced uniformly and fairly in all circuits without unduly burdening the judiciary. The issues in this case merit review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should grant the Petition for Writ of Certiori to review the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

LAW OFFICE OF PHILIP R. RUSS



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Amarillo, Texas 79105
Attorney for Petitioners
R. G. Russ, Jr. and Helen Russ

CERTIFICATE

The undersigned hereby certifies that copies of the above and foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have this day been served upon counsel for the Respondents by depositing same in the United States mail, with sufficient postage affixed, addressed as follows:

Stephen Greenberg, Esq.
Assistant Attorney General
State of Texas
P. O. Box 5075
Austin, Texas 78763

Judith Shepherd, Esq.
Assistant U.S. Attorney
16th Floor, U.S. Courthouse
1100 Commerce St.
Dallas, Texas 75249

Attorney General of the United States
Washington, D.C.

DATED AND SIGNED this the 30th day of April, 1981, at Amarillo, Texas.

Philip R. Russ, Esq.

APPENDIX "A"

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 79-1539

R. G. Russ, Jr., et ux, Helen Russ, Individuals,
Plaintiffs-Appellants,

versus

State of Texas, by and through the State Department of Highways and Public Transportation, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

---

(DECEMBER 19, 1980)

Before CHARLES CLARK, TJOFLAT and GARZA, Circuit Judges.

PER CURIAM:

This is an appeal from a final judgment adverse to the plaintiff's-appellant's claims seeking mandamus and injunctive relief against the construction by the State of Texas, the United States and their agencies and agents of U.S. Interstate Highway 27 from Hale Center, Texas, to the Swisher-Randall County line in Texas. After a hearing on the preliminary injunction, the district court decided the case on the merits and found that the defen-

dants-appellees had complied with the requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. §4321, *et seq.* We affirm.

Appellants, R. G. Russ, Jr. and Helen Russ, are farmer landowners along a portion of the proposed route of Interstate Highway 27 (IH27). The proposed route will upgrade the existing U.S. Highway 87 which currently bisects their farm property. The entire project is 52 miles long of which approximately 19 miles is on new location. Approximately 1,500 acres of farmland will be lost to this project of which 28 acres will be taken from appellants.

The Texas Highway Department is responsible for the project's planning and construction. The Department prepared a draft environmental impact statement (EIS) for the project. This draft EIS was cleared by the Federal Highway Administration and made available to the public and the Council on Environmental Quality on May 17, 1972. The draft EIS was also circulated to 16 concerned agencies and local governments. On May 3 and 4, 1973, public corridor hearings were held in Plainview and Tulia, Texas, respectively. Social, economic and environmental impacts of the project were presented and discussed. Various written comments were made by agencies suggesting improvements to be made in the EIS. All of these comments were considered in preparation of the final EIS. The final EIS was approved by the Federal Highway Administration on August 21, 1973. It was forwarded to the Council on Environmental Quality and was published in the Federal Register on October 5, 1973.

On October 1, 1974 and May 6, 1975, public design hearings were held in Plainview and Tulia, respectively. Again, social, economic and environmental impacts of the project were open to discussion. Four design

changes in the project were made in response to public comments. The final EIS was reevaluated by the Federal Highway Administration and it determined that the changes in design were not so substantial as to cause a changed environmental effect of significance to the quality of the human environment.

Appellants first complain on appeal that the district court erred in consolidating the hearing on preliminary injunction with the trial on the merits without notice. In addition, they complain that the consolidation denied them a right to a jury trial. Taking the latter complaint first, we find no authority for appellants' claim to a jury trial. Neither NEPA nor the Administrative Procedure Act, 5 U.S.C. §701 *et seq.* create a right to a jury trial. Furthermore, the rights and remedies sought to be enforced by appellants are wholly equitable and as such are to be tried to the court. We therefore hold that appellants had no right to a jury trial.

Next we must determine whether the district court abused his discretion in the consolidation. Rule 65(a)(2) of the Federal Rules of Civil Procedure give the trial judge discretion to combine a hearing on a motion for preliminary injunction with the trial on the merits. The combining may be done before or after the commencement of the hearing so long as the parties are not deprived of a right to jury trial. *See Bowles v. Bennett,* No. 78-3524, Slip Opinion 845 (5th Cir. 1980). Here, however, appellants had no deprivation of a jury trial for they had no such right. Furthermore, appellants never objected, by written motion, to apellee's joint motion to consolidate nor did they, by written motion, ask the Court to reconsider its order granting the motion of consolidation prior to or after the Court's entry of Judgment. Nor have appellants shown how they were prevented from fully developing their case or otherwise pre-

judiced by the consolidation. We hold that the district court did not abuse its discretion in the consolidation.

We now turn to appellants' main concern on this appeal of whether or not the district court applied the proper standard of review of the EIS and whether or not the EIS was adequate. Regarding the adequacy of the EIS, appellants' complaints are summarized as follows: The EIS does not meaningfully discuss or evaluate the permanent loss of agricultural land nor does it reasonably consider available alternatives including the "do nothing" alternative. The EIS is illogically fragmented by covering a segment of the IH 27 project starting in the middle of nowhere and continuing to a point in the middle of nowhere with no logical beginning or end. The EIS analysis is inadequate or ignores the effects of the project upon water sources such as the Callahan Draw and the Ogallala Aquifer. Lastly, the EIS ignores the effect of increased automobile emissions and related detrimental effects on agriculture caused by increased traffic.

In presenting their case to the district court, the appellants took the position that the defendants-appelees had the burden of establishing by a preponderance of the evidence that the EIS was adequate. This position was legally incorrect. The appellants were required to establish by a preponderance of the evidence, rather than a *prima facie* showing of deficiencies, that the EIS was inadequate. *Sierra Club V. Morton,* 510 F. 2d 813 (5th Cir. 1975). The appellants also had the burden of proving that any omitted environmental impacts were the probable effect of the project and that the adverse environmental effect would be significant. *Environmental Defense Fund, Inc. v. Corps of Engineers of the U.S. Army,* 492 F.2d 1123 (5th Cir. 1974). Since appellants failed to convince the district court

that the EIS was inadequate, their burden on appeal was to convince us that the district court was clearly erroneous. *Sierra Club V. Morton, Supra.*

The district court made extensive findings of fact concerning the procedures followed by the Texas Highway Department in obeying the requirements of NEPA. The court also found that appellants had failed to prove that the EIS did not consider and treat significant adverse effects of the project upon the environment and otherwise found and concluded that the EIS was adequate. Having reviewed the record, we find that the district court's findings have ample support. Neither the briefs or oral argument convince us that the district court is clearly erroneous. Therefore, the judgment of the district court is

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 79-1539

D. C. DOCKET NO. CA-5-78-138

R. G. Russ, Jr., et ux, Helen Russ, Individuals,
Plaintiffs-Appellants,

versus

State of Texas, by and through the State Department of Highways and Public Transportation, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

---

Before CHARLES CLARK, TJOFLAT and GARZA, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment

of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiffs-appellants pay to defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

December 19, 1980

ISSUED, AS MANDATE: February 26, 1981.

A true copy
Test: Gilbert F. Ganacheau
Clerk, U.S. Court of Appeals, Fifth Circuit
by /s/ Linda Johnson
Deputy, February 26, 1981
New Orleans, Louisiana

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

R. G. RUSS, JR.,	§	
ET AL,	§	
Plaintiffs	§	
	§	CIVIL ACTION
V.	§	NO. CA-5-78-138-D
	§	
THE STATE OF	§	
TEXAS,	§	
ET AL,	§	
Defendants	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Plaintiffs R. G. Russ, Jr. (Russ) and Helen Russ (Mrs. Russ) own land in Hale County, Texas along the proposed route of Interstate Highway 27 (IH 27). The proposed route will require the taking of 28.805 acres of plaintiffs' property as right-of-way.

2. Defendant George C. Wall, Jr. (Wall) is District Engineer for defendant Texas Department of Highway and Public Transportation (Texas Highway Department) responsible for planning and construction of IH 27 from 0.20 miles northeast of Hale Center north to the Swisher-Randall County line (the project).

3. Defendant R. L. Lewis (Lewis) is the Chief Engineer for Highway Design for the Texas Highway Department. Lewis and Wall were responsible for the

drafting of the environmental impact statement (EIS) for the project.

4. Defendant B. L. DeBerry is Engineer-Director and Chief Administrative Officer of the Texas Highway Department.

5. The project as planned is essentially an upgrading of U.S. 87, which is presently a four-lane highway with a median strip and numerous at-grade crossings and which bisects Plaintiffs' property. The new facility will be a four-lane, controlled access highway with frontage roads, paved shoulders, and improved drainage features. The project length is about 52 miles of which approximately 19 miles is on new location.

6. The draft Environmental Impact Statement (EIS) for the project was cleared by the Federal Highway Administration (FHWA) and made available to the public and the Council on Environmental Quality on May 17, 1972.

7. The draft EIS for the project was circulated to 16 agencies and local governments including the Department of Transportation, Department of Housing and Urban Development, the Department of Health, Education and Welfare, the Department of Agriculture, the Army Corps of Engineers, the Department of Interior, and the Environmental Protection Agency (EPA).

8. After proper notice, corridor public hearings on the project were held in Plainview, Texas, on May 3, 1973, and in Tulia, Texas, on May 4, 1973. Social, economic and environmental impacts of the project and several alternatives were presented and open to discussion.

9. A copy of the draft EIS was made available for public inspection at the corridor hearings.

10. Russ was present at the Tulia corridor hearing and he made no comment on the record.

11. Two representatives of the Texas Highway

Dpeartment responsible for the project, including Wall, participated in the corridor hearings.

12. An announcement was made at the Tulia hearing that:

> "Written statements are welcome and those received within 10 days of this hearing will be accepted and will become a part of this hearing."

Plaintiffs did not submit any written comments or responses to this announcement.

13. Comments on the draft EIS were made by 14 of the 16 agencies to which it was circulated. These comments and comments made at the hearing and by letters after the hearing by private citizens were considered and disposed of in the final EIS.

14. The final EIS was approved and adopted by the Regional Office of the FHWA on August 21, 1973.

15. The EPA reviewed the final EIS and determined that it was not unsatisfactory from the standpoint of public health or welfare or environmental quality.

16. The FHWA forwarded the final EIS to the Council of Environmental Quality (CEQ) and it was published on October 5, 1973, in the Federal Register.

17. After proper notice design hearings were held in Plainview, Texas, on October 1, 1974, and in Tulia, Texas, on May 6, 1975. The Plainview hearing was attended by both Russ and Mrs. Russ. It was announced at these hearings that an EIS was on file in the District Office in Lubbock and in the Resident Engineer's Office in Plainview for inspection and copying.

18. A presentation was made at both design hearings of the social, economic, environmental impacts of the project and these impacts were open to discussion.

19. Neither Russ or Mrs. Russ made comments on the record at the Plainview hearing.

20. The design features of the project were discussed

at the design hearings. The proposed interchange of the project with F.M. 2337 was described at the Plainview hearing.

21. Those in attendance at the Plainview hearing were informed that they could submit written statements within 10 days of the hearing. Plaintiffs did not submit any written statement.

22. Two representatives of the Texas Highway Department responsible for the project, including Wall, were present and participated in the design hearings. A division engineer for the FHWA was present at the Tulia hearing.

23. Four design changes were made in response to comments by the public at the design hearings.

24. The final EIS was reevaluated by the FHWA and it determined that these changes in design were not so "substantial" as to introduce a new or changed environmental effect of significance to the quality of the human environment. There has been no showing that the design changes were "substantial" in that a new or changed environmental effect of significance to the human environment would be introduced by such changes.

25. Detailed design for the construction contract for the project has not been completed. The first construction contract for the project is scheduled to be let in February, 1980.

26. Water drainage studies for the design of the project adjacent to plaintiffs' property are ongoing. The culverts for this highway section will be designed to pass a 50-year floor on the main lanes. The design of the culverts of the frontage roads has not been finalized.

27. Callahan Draw is a shallow depression located between two small lakes on plaintiff's property. Callahan Draw is usually dry, but runs water in times of heavy rain. In these respects it is similar to other draws crossed by the project.

28. In times of heavy rainfall water accumulates on the plaintiffs' property near U.S. 87. Since 1960 plaintiffs' property has been flooded by rain water three times. The culverts under U.S. 87 at this location are inadequate to pass a 50-year flood.

29. Callahan Draw is not mentioned in the final EIS. The final EIS does state that the project crosses five other similar draws and names them. It further states these draws are natural drainage draws and carry water only from heavy rainfall over the area.

30. There has been no showing that at the time of the preparation of the EIS the crossing of Callahan Draw by the project would have any significant adverse effect upon the environment.

31. The Canadian River Aqueduct (the Aqueduct) is a 66" water pipe which passes under plaintiff's property. The project will cause a section of the aqueduct to be crossed at one additional point than is now crossed by present U.S. 87. Highways also cross the Aqueduct at other points. At the time of the preparation of the final EIS, there was no history of any ruptures of the Aqueduct at such crossings.

32. The Aqueduct is owned by the Bureau of Reclamation, United States Department of the Interior, and is operated and maintained by the Canadian River Municipal Water Authority.

33. The final EIS took into consideration the crossing of the Aqueduct by the project and contemplated the use of all necessary precautions to avoid any significant adverse effects upon the environment.

34. On February 18, 1977, an agreement was signed by the Canadian River Municipal Water Authority, the Bureau of Reclamation, and the Texas Highway and Public Transportation Commission, which sets forth measures that would be taken by the signatories to pro-

tect approximately 252 feet of the aqueduct where it will be involved with the construction and operation of the project.

35. There has been no showing that the measures called for in the agreement described above would not adequately protect Aqueduct where it is crossed by the project.

36. The Ogallala Aquifer (the Aquifer) is located beneath plaintiffs' property and the project.

37. The final EIS mentions that the Aquifer is located at depths between 300 and 500 feet and is of good quality, is potable and is used for irrigation and domestic purposes. The EIS also concluded that the quality of the water and the water table would not be affected by the project.

38. There has been no showing that at the time of the preparation of the final EIS the project would have any significant adverse effect upon the Aquifer.

39. The final EIS states that the quality of air would not be affected by the project. In response to a comment that air quality could possibly be affected because of exhaust emissions, the final EIS stated that because of required installation of exhaust emission control devices on new vehicles exhaust emissions would not have a significant impact on air quality.

40. In response to a comment that construction will generate dust and other pollutants and therefore the effects on air quality and preventive measures should be discussed, the final EIS stated that sprinkling measures will keep down dust and other pollutants during the construction phase of the project.

41. There has been no showing that at the time of the preparation of the final EIS either exhaust emissions from future traffic or dust and other pollutants generated by the construction of the project would have any significant adverse effect upon the environment.

42. The final EIS discussed alternative routes and a "do nothing" alternative to the project. The estimated costs, transportation requirements, design and engineering factors and the environmental impact of the project and the alternative routes were discussed.

43. There is no proof that the project will result in an irretrievable loss of agriculture property.

44. There has been no showing that at any time of the preparation of the final EIS the use of herbicides and pesticides in connection with the project would have any significant adverse effect on the environment.

45. There has been no showing that at the time of the preparation of the final EIS the project would have any significant adverse effect on wildlife, scenic beauty, noise level, the weeds, or archeological sites.

CONCLUSIONS OF LAW

1. FHWA Procedure and Policy Memorandum (PPM) 90-1 contains the FHWA procedures implementing 42 U.S.C. §4332 which were applicable to the preparation of the final EIS.

2. Plaintiffs have not proven by a preponderance of the evidence that any defendant failed to comply with any relevant provision of PPM 90-1 in preparing the final EIS.

3. EPA complied with 42 U.S.C. §7609 in reviewing the final EIS.

4. PPM 20-8 contains the FHWA procedures implementing 23 U.S.C. §128 which were applicable to the holding of public hearings on the project.

5. Plaintiffs have not proven by a preponderance of the evidence that any defendant failed to comply with 23 U.S.C. §128 and PPM 20-8 promulgated thereunder in holding public hearings concerning the project.

6. Defendants had no duty to supplement the final EIS pursuant to 23 C.F.R. §771.15 with respect to the four design changes made after the completion of the final EIS.

7. Plaintiffs have not proven, by a preponderance of the evidence, that the final EIS does not consider and treat significant adverse effects of the project upon the environment, alternatives to the project, the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity and any irreversible and irretrievable commitments of resources which would be involved in the project.

8. Plaintiffs have not proven by a preponderance of the evidence that the final EIS fails to study, develop, and describe appropriate alternatives to the project.

9. The final EIS adequately treats the environmental effect of the crossing of the Aqueduct by the project. Since, at the time of the preparation of the final EIS, the Texas Highway Department had no reason to believe that the crossing of the Aqueduct posed any special design problems not encountered in constructing the existing highway crossings of the Aqueduct and had no knowledge of ruptures in the Aqueduct caused by existing highway crossings, the final EIS was not required to state further than that all necessary precautions would be utilized during the design phase of the project to avoid rupture of the Aqueduct.

10. The sufficiency of an EIS tested under the "rule of reason." It is unreasonable to require an agency to predict in an EIS significant adverse effects on the environment that may result from faulty design of a facility when there is no proof that the facility poses design problems which distinguish it from similar facilities having no history of causing adverse effects upon

the environment. Further, an agency need not presume the faulty construction of a facility.

11. The court does not have pendant jurisdiction over plaintiffs' claim under the Deceptive Trade Practice Act of Texas, Texas Business and Commerce Code, §§17.01 et. seq., because that claim and plaintiffs' federal claims do not derive from a common nucleus of operative fact.

12. All relief sought by plaintiffs should be denied.

Dated this 2nd day of February, 1979.

/s/ Robert M. Hill

United States District Judge

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS LUBBOCK DIVISION

R. G. RUSS, JR.,	§	
ET AL,	§	
Plaintiffs	§	
	§	CIVIL ACTION
V.	§	NO. CA-5-78-138-D
	§	
THE STATE OF	§	
TEXAS,	§	
ET AL,	§	
Defendants	§	

JUDGMENT

This action came on for trial before the court, Honorable Robert M. Hill, United States District Judge, and the issues having been duly tried and a decision having been duly rendered,

It is ORDERED and ADJUDGED that the plaintiff's, R. G. Russ, Jr., and Helen Russ, take nothing, that the action be dismissed on the merits and that the defendants, The State of Texas, by and through the State Department of Highways and Public Transportation, an agency of the State of Texas, and the Environmental Protection Agency, an agency of the United States of America, and the U.S. Department of Transportation and Federal Highway Administration, an agency of the United States of America, George C. Wall, Jr., Morris Monroe, Clinton B. Spotts, Dave Williamson, A. L. Lewis, and B. L. DeBerry, and/or their successors, recover of the plaintiffs their cost of action.

Dated this 2nd day of February, 1979.

/s/ Robert M. Hill

United States District Judge

APPENDIX "D"

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 79-1539

R. G. Russ, Jr., et ux, Helen Russ, Individuals,
Plaintiffs-Appellants,

versus

State of Texas, by and through the State Department of Highways and Public Transportation, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

---

ON PETITION FOR REHEARING

(FEBRUARY 3, 1981)

Before CHARLES CLARK, TJOFLAT and GARZA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Reynaldo G. Garza

United States Circuit Judge

Office-Supreme Court, U.S.
FILED
JUN 1 1981
ALEXANDER L. STEVAS,
CLERK

NO. 80-1827

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

R. G. RUSS, JR, ET UX,

Petitioners

VS.

STATE OF TEXAS, ET AL.

Respondents

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

STATE RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The basic question presented for review is whether the district court and the court of appeals utilized the proper standards for reviewing the adequacy of the administrative process which included the preparation and approval of an Environmental Impact Statement (EIS).

A second question presented for review is whether the actions taken by the respondent governmental agencies were based on substantial evidence and were in compliance with applicable agency rules and procedures.

A threshhold question presented for review is whether there is substantial evidence in the record to support the factual findings of the district court, which were, in turn, affirmed by the Fifth Circuit.

State Respondents perceive no question of conflict between the opinions below in this case and any opinions of this Court or the other courts of appeals.

LIST OF PARTIES

Petitioners are Mr. and Mrs. R. G. Russ, Jr.

Respondents represented in this brief (and called State Respondents herein) are The State of Texas; the State Department of Highways and Public Transportation; Mr. A. L. Lewis, Mr. G. Wall, Jr., and Mr. M. G. Goode (successor to Mr. B. L. DeBerry), all in their official capacities as officials of the State Department of Highways and Public Transportation.

Additional respondents (not represented in this brief) are the Environmental Protection Agency (an agency of the United States of America); Clinton B. Spotts, in his capacity as an official of the Environmental Protection Agency; and the Secretary, United States Department of Transporation.

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STATE RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

OPINIONS BELOW

The opinions of the United States Court of Appeals and the United States District Court, as well as the District Court's Findings of Fact and Conclusions of Law, are faithfully reproduced in the Appendices to the Petition.

JURISDICTION OF THIS COURT

Petitioners' statements under section entitled "Jurisdiction" in the Petition are accepted.

STATUTES INVOLVED

Petitioners' statement that the applicable statute is 42 U.S.C. § 4332 is accepted by State Respondents with one exception: part (F) would seem to be directed to international cooperation, which has nothing to do with the facts of the instant case.

STATEMENT OF THE CASE

Petitioners filed an action in the United States District Court for the Northern District of Texas, Lubbock Division, seeking to enjoin further planning, property acquisition and construction on an interstate highway project in Hale and Swisher Counties in the Texas Panhandle between Lubbock and Amarillo. The project is essentially the improvement of an old 4-lane U.S. highway into an interstate highway. The old highway, U.S. 87, was built between 1928 and 1935 and was in generally poor or below average condition, with deteriorating roadway, low clearances, unpaved shoulders and many crossings at grade. Notwithstanding improvements made in the 1950's and 1960's, its condition had been the subject of numerous complaints by the public.

The interstate highway, IH 27, was well underway with millions of dollars already spent before Petitioners brought the instant suit in 1978 claiming that no final Enviromental Impact Statement (EIS) had been filed before commencing the project, or alternatively, that the final EIS which was filed was inadequate. The interstate highway will be a safer roadway with controlled

access, frontage roads, paved shoulders, adequate clearances, improved drainage features, and overpasses and underpasses instead of crossings at grade. The entire project length is about 52 miles, of which only 19 miles will be on new location. In other words, most of the project is on right of way that was acquired and has been traversed by an existing highway for several decades.

Petitioners were present at public hearings conducted in 1973 and 1974 when the enviromental impact of the project was discussed and the draft EIS was made available for public inspection. Although public comment and criticism were repeatedly invited, Petitioners did not comment or criticize the draft EIS of which they now complain. Public comment at the hearings was overwhelmingly in favor of the project; and Respondents' receptivity to public comment is shown by several design changes made in direct response to public participation at the design hearings.

Petitioners filed the instant suit approximately five (5) years after adoption of the final EIS and, curiously, only two months after their rejection of the State's final offer of compensation for the condemnation of some 28.8 acres of Petitioners' farmland for the project. The final offer is a step in the State's acquisition of property by eminent domain; following rejection of the offer, the State filed eminent domain proceedings in the State court in Hale County seeking judicial determination of the fair market value of the property to be taken. Condemnation proceedings in regard to the acquisition of 28.8 acres of Petitioners' property by eminent domain are still pending in State Court.

Petitioners' Statement of the Case contains serious factual inaccuracies. One inaccuracy is the statement that a single feature of the project is admittedly a major federal action in itself. This particular feature, the

crossing of the Canadian River Aqueduct, was adequately discussed in the EIS and was found by the district court to have been adequately considered and discussed. This aspect of the project is now complete and there have been no ill environmental consequences; discussion on this point is now moot.

Another factual inaccuracy is a statement that there will admittedly be an increase in certain auto emissions as a result of the project. Respondents denied and did not admit this allegation. Petitioners did not show (and the district court did not find) that there would be any increase in exhaust emissions as a result of the project or that completion of the project would have this kind of adverse effect upon the environment.

An outrageous factual inaccuracy is the assertion that the EIS contains no discussion of the "do nothing" alternative and that the absence of such discussion is undisputed. This proposition was vigorously disputed. The EIS does contain discussion of the "do nothing" alternative and the district court so found (Finding of Fact 42, Petition Appendix B-7). Moreover, the Court of Appeals held that the district court's findings have ample support in the record (Petition Appendix A-5).

What is undisputed in this case is that the Federal Highway Administration and the Texas State Department of Highways and Public Transportation complied fully with the applicable procedures that had been promulgated by the Department of Transportation pursuant to 42 U.S.C. § 4321, et seq., in preparing, circulating, adopting, approving and filing the EIS, as well as in holding the public hearings which comprise an integral part of the decision-making process. The applicable procedures were those contained in Federal Highway Administration Policy and Procedure Memoranda (PPM) 90-1 and 20-8, and the district court held there was no proof of noncompliance with the

regulations by any respondent (Conclusions of law 2 & 5, Petition Appendix B-7). In fact, there was complete compliance with the applicable Policy and Procedure Memoranda as the record well substantiates.

Another factual inaccuracy in the Petitioners' Statement is the characterization of some property crossed by the project as "wetlands." This is a brand new contention which is not mentioned in the record below. But if the reference is intended to apply to the property that was discussed in greatest detail in the trial court, then it is far afield because the evidence was that Callahan Draw is *usually dry.* (Finding of Fact No. 27, Petition Appendix B-4).

The factual inaccuracies of the Petition are so numerous that this response is not intended to be an exhaustive catalog of them. Respondents have attempted to point out the most important inaccuracies.

ARGUMENT

The most obvious reason for denying the writ of certiorari is the presence of serious inaccuracies in the Petition. Such inaccuracies are violative of this Court's Rule 21.5. The actual nature of the questions presented for review is hidden by misrepresentation of the facts in the case and the holdings below. For example, Petitioner's formulation of the questions presented for review would lead a reader to think that the district court and the court of appeals held an Enviromental Impact Statement (EIS) to be adequate when the EIS did not even mention such things as the "do nothing" alternative, the commitment of farmland to the project, and emissions. The actual holding of the courts below was that these and other relevant environmental concerns *were* discussed in the EIS and that the administrative process which includes EIS preparation complied fully with all applicable agency regulations.

It appears that by misstating the factual findings below, petitioners seek by writ of certiorari to relitigate facts which were found adversely to their position. This would be an abuse of the writ of certiorari. In regard to the findings of the district court, the Fifth Circuit held unequivocally, "Having reviewed the record, we find that the district court's findings have ample support." (Petition Appendix A-5). A more straightforward method of obtaining review of adverse fact findings would be to suggest as a question presented for review, "Are factual findings by the district court in regard to the EIS, which were affirmed by the court of appeals, based upon substantial evidence in the record?" State respondents submit that the record amply supports all the district court's findings, and the court of appeals so held.

State Respondents can perceive no conflict between the opinions below and the opinions of this Court or of any other circuit. Petitioners argue that the holdings below conflict with *Strycker's Bay Neighborhood Council, Inc. v. Karlen*,____U.S.____, 100 S.Ct. 497, 62 L.Ed.2d 433 (1980), and with *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 55 L.Ed.2d 460, 98 S.Ct. 1197 (1978). Both of the cited cases support denial of certiorari or summary affirmance of the holdings below.

In *Strycker's Bay, supra*, this Court held that the National Enviromental Policy Act (NEPA) imposes duties upon the agencies that are "essentially procedural" at 100 S.Ct. 500, citing *Vermont Yankee, supra.*
Petitioners have not complained and have no basis to complain that there was any deviation from the required procedures in the instant case. The district court made a number of findings (affirmed by the Fifth Circuit) in regard to agency compliance with applicable procedural requirements (Findings of Fact Nos. 6,7,8,9,13,14,15,16 and Conclusions of Law Nos. 1,2,3,4,5; Petition Appendix B-2,3,7).

The only purpose which can be served by granting the writ of certiorari is to make this Court the final arbiter of whether the agency decisions were good or bad, or what the decisions might have been if the members of this Court had participated in them. This is exactly the sort of review that was rejected by this Court as unsatisfactory in *Vermont Yankee, supra,* when admonishing the Court of Appeals for the District of Columbia Circuit that it must not impose upon an agency its own notion of which procedures are best or most likely to further some vague, undefined public good. At 435 U.S. 549, 98 S.Ct. 1214.

In essence, what Petitioner is seeking is that this Court make another review of the considerable trial record and voluminous exhibits in order to find what both lower courts have agreed was not shown by Petitioners below -- evidence that there is any significant environmental impact which was not considered by the responsible agencies in their decision-making process. Each of the areas which Petitioners alleged were not discussed in the EIS were found by the district court to have been discussed therein (Findings of Fact Nos. 29,30,33,37,39,40,42; Petition Appendix B-5,6,7); the review sought would require an examination of the record for the evidence supporting each finding, an examination already undertaken by the Fifth Circuit in its review.

Petitioner argues that the opinion below conflicts with the seventh Circuit's opinion in *Swain v. Brinegar,* 517 F.2d 766 (7th Cir. 1975), modified 542 F.2d 364 (7th Cir. 1976, en banc). This is not so. In *Swain*, unlike in the instant case, the Seventh Circuit found an EIS wanting for failure to comply with Federal Highway Administration Policy and Procedure Memorandum (PPM) 90-1 at 542 F.2d 368-370. In the instant case, the district court found expressly that Petitioners had failed to prove any noncompliance with PPM 90-1.(Conclusions of Law No. 2, Petition Appendix B-7).

The language in *Swain v. Brinegar, supra,* which best supports Petitioners' argument is found in the panel opinion reported at 517 F.2d 766. The panel opinion is noted for its rejection of an EIS because its preparation had been delegated by federal to state officials (517 F.2d at 776-777); Congress thereafter amended NEPA to prevent such a result (89 Stat. 424, Public Law 94-83), and the Seventh Circuit, sitting en banc, issued a new opinion recognizing that the basis of the panel opinion had been eviscerated by Congress (542 F.2d at 367). In other words, the holding in *Swain v. Brinegar, supra,* with which the opinion below allegedly conflicts, is not the law of any circuit including the Seventh Circuit whose panel opinion was superseded by an en banc opinion entirely harmonious with the holdings in the instant case.

Petitioners have argued that the decision below is in conflict with *Robinson v. Knebel,* 550 F.2d 422 (8th Cir. 1977). This is not so. The district court in *Robinson, supra,* held that there was an adequate discussion of alternatives in the EIS and dismissed the complaint; the Eighth Circuit agreed and affirmed the dismissal. Similarly, in the instant case the district court found that there was an adequate discussion of alternatives to the project and dismissed the complaint; the Fifth Circuit agreed and affirmed on the basis that the district court's findings have ample support in the record. (Petition Appendix A-5, B-7, B-8).

A further reason for denial of the writ is the unfairness to the general public that would result from continuation of the present litigation and the inequity that would arise from any grant of equitable relief to the petitioners. The facts which show that no relief ought to be granted are: a) The petitioners attended hearings in 1973 and 1974 where environmental impact of this project was discussed and the draft EIS was made available

for public inspection or comment prior to its final adoption or approval. b) The EIS in its final form addressed comments and questions that were raised about the project or the contents of the draft EIS. c) Although comment or criticism of the EIS or the project was invited, Petitioners did not comment. d) Although written comments were invited at the conclusion of the hearings, Petitioners did not comment in response to the invitation. e) The nature of Petitioners' present criticisms of the EIS is such that if any of the alleged deficiencies existed, and had been pointed out when the EIS was in its draft form, they could easily have been remedied before final approval of the EIS. f) At the public hearings the comments of those who did choose to comment about the project were favorable, and the wishes of other members of the community who did speak out at the proper time would be thwarted if relief were given to those who did not bother to comment. g) Final approval of the EIS preceded the filing of Petitioners' lawsuit by nearly five years; in the interim, millions of dollars have been spent on the project and millions more are committed. h) Petitioners have a full and fair opportunity to obtain economic satisfaction for the property being acquired from them in the eminent domain proceedings presently pending in state court. Petitioners' failure to utilize the public forums intended to offer all of the people affected by this project an opportunity to be heard and to influence the governmental decisions attacked in this lawsuit *before* they are put into effect was the subject of numerous findings of fact by the trial court (affirmed by the court of appeals). (Findings of Fact Nos. 8,9,10,12,13,18,19,21; Petition Appendix B-2,3,4).

CONCLUSION

The writ of certiorari should be denied by the Court in this case because:

A) There is no conflict between the opinion of the Fifth Circuit in the instant case and any opinions of this Court or of any other circuit.

B) Petitioners' quarrel with the opinions below is with the facts found adversely to their case by the trial court and affirmed by the court of appeals on the basis of substantial evidence in the record; the writ of certiorari should not issue merely to relitigate adverse fact findings below.

C) The Petition contains numerous factual inaccuracies, in that it represents as undisputed or admitted a number of propositions that were vigorously disputed, never admitted, and were the subject of fact findings by the courts below that are at odds with the facts alleged by Petitioners to be the basis of their case.

D) It would be grossly unfair to further protract this litigation in view of the conduct on the part of Petitioners which shows laches and an unwillingness to participate in the administrative process underlying agency decisions at a stage when public participation is meaningful and other members of the public could have an equal opportunity to respond also.

E) This Court should not dignify by granting the writ a transparent attempt to use NEPA for the sole purpose of making a collateral attack upon a condemnation proceeding pending in state court, which proceeding has been held to be a constitutionally valid, lawful undertaking.

F) The challenged agency decisions were based upon substantial compliance with applicable regulations promulgated pursuant to NEPA and the courts below so held. Moreover there is not the least indication that there has been any arbitrary or capricious agency action.

In concluding, this writer wishes to note that, much though he would relish the opportunity to argue his first case before the United States Supreme Court, he cannot in good conscience recommend this case as one worthy of the Court's consideration.

WHEREFORE, PREMISES CONSIDERED, State Respondents pray that the petition for writ of certiorari be denied.

Respectfully submitted,

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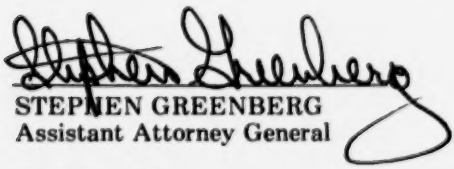

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CERTIFICATE

I do hereby certify that true copies of the foregoing brief have been served upon counsel for Petitioners and upon the Solicitor General of the United States in accordance with the rules of this Court and the statutes of the United States on the 29th day of May, 1981, by depositing same in sealed envelopes properly addressed with postage prepaid in the U.S. Mail.

Stephen Greenberg

Office-Supreme Court, U.S.
FILED
JUN 16 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1827

In the Supreme Court of the United States

OCTOBER TERM, 1980

R.G. RUSS, JR., ET UX., PETITIONERS

v.

TEXAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the petitioners had the burden of establishing by a preponderance of the evidence that the environmental impact statement adopted by the Federal Highway Administration was inadequate.

2. Whether the district court's finding that the environmental impact statement adopted by the Federal Highway Administration was adequate was clearly erroneous.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1827

R.G. RUSS, JR., ET UX., PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-5) will not be reported. The opinion of the district court (Pet. App. B-1 to B-9) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 1980. A petition for rehearing was denied on February 3, 1981 (Pet. App. D-1). The petition for a writ of certiorari was filed on May 1, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Texas Highway Department planned to upgrade fourlane highway U.S. 87 to become part of Interstate Highway 27 (IH-27). The contemplated road construction project is 52 miles long, running from Hale Center in Hale

County, Texas, to Happy, Texas, at the Swisher-Randall County line. The proposed route for IH-27 would require condemnation of 28.805 acres of petitioners' farmland.

The Texas Highway Department prepared a draft environmental impact statement (EIS) for the road construction project. This draft EIS was approved by the Federal Highway Administration (FHWA) in May 1972, and subsequently was circulated to sixteen interested federal agencies and local governments.

In May 1973, corridor public hearings were held in two towns near the project.[1] The environmental, social, and economic impacts of the project were discussed. In preparing a final EIS for the project, the FHWA considered written comments submitted by agencies as well as comments made by citizens who attended the public corridor hearings. The final EIS was approved by the FHWA on August 23, 1973.

Highway design public hearings were held in the same two towns in May 1975. At these hearings the impacts of the project were again discussed with the public. Design changes were made in response to public comments. The final EIS was reevaluated by the FHWA, and it was determined that the design changes were not so substantial as to require changes in the EIS.

The final EIS discussed four alternatives to the project, including that of taking "no action." The adverse environmental effects of the project were found to be displacement of families and businesses by acquisition of land for the project, dividing of farms, and increased traffic noise. These effects were not found to affect significantly the quality of

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[1]Hearings on both the location of a highway and its design are required by 23 U.S.C. 128 and FHWA regulations at 23 C.F.R. 790.1 *et seq.*

the human environment. The final EIS found no significant effect on air quality, no increased erosion, and no effect on water quality or the water table.

Petitioners filed this action to enjoin construction of the project, on November 28, 1978, alleging that the final EIS did not comply with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*[2]

The district court conducted a three-day hearing, and on February 2, 1979, entered judgment for the defendants (Pet. App. C-1). The district court held, *inter alia*, that the petitioners had failed to prove by a preponderance of the evidence that the final EIS had not considered or adequately treated alternatives to and adverse effects of the project or that the defendant had not complied with FHWA Procedure and Policy Memorandum (PPM) 90-1 in preparing the EIS.[3]

On December 19, 1980, the court of appeals affirmed (Pet. App. A-1 to A-7), holding, *inter alia*, that the petitioners had the burden of establishing by a preponderance of the evidence that the EIS was inadequate and that the district court's finding that petitioners had not met their burden was amply supported by the record and not clearly erroneous.

ARGUMENT

The decision below is correct, does not conflict with any decision of this Court or any court of appeals, and does not present any issue warranting review by this Court.

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[2]The complaint also alleged that defendants had violated the Texas Deceptive Trade Practice Act, Tex. Bus. & Com. Code Ann. §17.01 *et seq.* (Vernon 1968), by making false representations during negotiations for purchase of petitioners' land by the Texas Highway Department. The district court held it did not have pendent jurisdiction over this state claim (Pet. App. B-9).

[3]PPM 90-1, 37 Fed. Reg. 21809-21816 (1972), contains the FHWA procedures implementing 42 U.S.C. 4332 which were applicable to the preparation of the final EIS.

1. Petitioners contend that the court of appeals erred in holding that those challenging an EIS have the burden of proof (Pet. 11-12). Petitioners allege here, as they did in the court below, that once they make a prima facie showing that the EIS is inadequate, the burden then shifts to the defendant agencies to show that the EIS adequately discusses all significant environmental effects. The court of appeals correctly held (Pet. App. A-4) that the petitioners had the burden of showing by a preponderance of the evidence that the EIS was inadequate, that any omitted environmental effects were the probable consequence of the project, and that the adverse effects would be significant. *Sierra Club* v. *Morton*, 510 F. 2d 813, 818 (5th Cir. 1975); *Environmental Defense Fund, Inc.* v. *Corps of Engineers of the United States Army*, 492 F. 2d 1123, 1137 (5th Cir. 1974).

2. As the district court found (Pet. App. at B-7 to B-8), the final EIS for this project fully complied with the requirements of NEPA. The preparation of the final EIS satisfied all procedural requirements, and the EIS adequately discussed significant environmental effects of the project and possible alternatives.

Petitioners' claim that the decision in this case conflicts with *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978) and *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, 444 U.S. 223 (1980), is without merit. Petitioners cite those cases for the proposition that a court, in reviewing an agency's environmental decisionmaking, should " 'insure that the agency considered the environmental consequences' "[4] That obligation was fully met in this case.

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[4]The statement relied upon by petitioners is extracted from a sentence which reads in its entirety as follows:

> On the contrary, once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot "interject itself within the area of discretion of

Petitioners' only allegations of failure to consider environmental consequences are that the EIS did not sufficiently discuss loss of agricultural land, the effect of automobile emissions on crops, the effect of the construction on the watershed and the Ogallala Aquifer,[5] and the "no action" alternative (Pet. 7-8). The district court specifically found that petitioners had not shown that the project would have a significant effect on air quality, the watershed, or the Ogallala Aquifer, or that it would result in an irretrievable loss of agricultural land (Pet. App. B-5 to B-7). The district court also found that the EIS discussed alternative routes and a "no-action" alternative to the project (*id.* at B-7). These findings, held not clearly erroneous on appeal (*id.* at A-4 to A-5), refute any contention that the final EIS was inadequate or that the review undertaken by the lower courts failed to meet the standards set forth in *Vermont Yankee Nuclear Power Corp., supra*, and *Strycker's Bay Neighborhood Council, Inc., supra.*

Petitioners contend that the final EIS was inadequate because it discussed only one segment of the whole IH-27 (Pet. 9-10). However, an EIS for a highway project need not include the whole length of the highway; it need only discuss a logical segment. *Indian Lookout Alliance* v. *Volpe*, 484 F. 2d 11, 16-19 (8th Cir. 1973). The applicable FHWA policy and procedure memorandum requires an EIS for a project to discuss "[a] substantial length of highway between logical termini" (PPM 90-1, 37 Fed. Reg. 21809-21816 (1972)). The district court found that petitioners did

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the executive as to the choice of the action to be taken."

Strycker's Bay Neighborhood Council, Inc. v. *Karlen, supra*, 444 U.S. at 227-228 (citation omitted).

[5]The Ogallala Aquifer is a waterbearing geological formation located 300 to 500 feet under petitioners' land.

not prove that defendants failed to comply with any part of PPM 90-1 in preparing the final EIS (Pet. App. B-7). The court of appeals properly upheld this finding as supported by the record and not clearly erroneous (*id.* at A-4 to A-5).[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

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JUNE 1981

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[6]Petitioners claim this decision conflicts with *Swain* v. *Brinegar*, 542 F. 2d 364 (7th Cir. 1976) (*en banc*) (Pet. 9-10). However, in *Swain*, the EIS covered a segment of the highway the northern terminus of which was near no major crossroad or population center as required by PPM 90-1. The district court in this case found no violation of the requirements of PPM 90-1.

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NO. 80-1827

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Supreme Court of the United States

OCTOBER TERM

R. G. Russ, Jr., et ux, Helen Russ

Petitioners,

vs.

State of Texas, et al,

Respondents,

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION FOR CERTIORARI

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Petitioners R. G. Russ, Jr., et ux, Helen Russ ("Russ") by way of reply to the State respondents brief in opposition to the Petition for Writ or Certiorari would show unto the Court that the State has erroneously stated in its Statement of the Case that the petitioners have misstated the facts and recited factual inaccuracies. These statements by the State of Texas are untrue and apparently are an effort to extricate respondents from the precarious position in which they find themselves. Respondents do this by casting aspersions upon the petitioners factual recitations to the Court. It is unfortunate when counsel engages in a personal attack on the petitioners, such as the one in the State's reply, and such attack demonstrates respondents lack of objectivity. Petitioners will not raise this attack to the dignity of a response. On the contrary, Petitioners have again searched the record with respect to the State's testimony through George C. Wall, Jr., District Engineer,

Texas Department of Highways and Public Transportation, the party who testified he had overall responsibility for the project in question.

Beginning at the bottom of page three of the respondents brief in opposition to Petition for Writ of Certiorari ("opposition brief") the State would have this Court believe that petitioners inaccurately made the statement in the petition that a single feature of the project is admittedly a federal action in itself. This factual statement by petitioners is correct. Reference is made to the transcript of the testimony at the preliminary injunction beginning on December 15, 1978, page 166 beginning at line 2:

"A. I am George C. Wall, Jr.
Q. What's your address Mr. Wall?
A. I live at 5417 78th Street, Lubbock, Texas.
Q. What's your occupation, Mr. Wall?
A. I am a Civil Engineer and District Engineer to the Texas Highway Department, District Five, with headquarters at Lubbock, Texas.
Q. With respect to the Interstate 27 upgrading project that's made the subject of this particular litigation, would it be a correct statement to say that you are the man there in Lubbock that's supervising, overseeing, and is in charge of that project?
A. Yes, sir, it would be."

Continuing with the testimony of George C. Wall, Jr., at page 414 of the transcript we find the following statement beginning at line 8 concerning the crossing of Interstate 27 over the Canadian River Municipal Water Authority's aqueduct:

"Q. What would be the crossing of the Canadian River aqueduct, is that considered a major aspect of this overall project?
A. Yes, sir, I would say that that's a major as-

pect . . ."

Continuing at page 469 of the record, beginning at line 12 Mr. Wall states (with reference to crossing the aqueduct by I-27):

"Q. Would you say that dealing with this particular utility adjustment, whether you cross it with a bridge or encase it or move it, is a major federal action if you know?

A. I believe it would be a major action."

Continuing on Page 4 of the opposition brief the State of Texas makes the following statement, "Another factual inaccuracy is a statement that there will admittedly be an increase in certain auto emissions as a result to the project . . ." again the State of Texas is misleading the Court as Mr. Wall testified in this regard at page 225, line 15:

Q. Are you aware of the fact that in the Impact Statement you say that emissions of hydrocarbons by automobiles will be reduced significantly because by the time you get to building this road the cars will have catalytic converters on them?

A. I am aware of that.

Q. All right. Are you aware of the fact that the catalytic converter has a tendency to discharge sulfuric acid from the exhaust pipe of an automobile?

A. Yes, Sir, I am aware that it does.

Q. Are you aware of the fact that farmers, including my client, up and down the highway, grow cotton that grows right up to the right of way perhaps even a little farther?

(Continuing at page 226)

A. But building the road it doesn't have anything

to do with catalytic converters. They're here regardless.

THE COURT: He says they're going to be out there whether they build this new road or not.

THE WITNESS: Right.

Q. (By Mr. Russ) Don't you say in your Impact Statement that if you build the new road you're going to increase the number of trips and the average daily trips of automobiles?

A. Yes, Sir, and we give some figures in there also.

Q. Right. If you build this new road you're going to have a lot more cars —

A. No, sir, we do not say a lot more. I think we give some specific numbers.

Q. Is it a rather insignificant number?

A. As I recall from this Statement, we state average traffic being, perhaps, say, in the range of ten thousand and new trips two years after completion being in the range of five hundred additional trips, in that range.

(Continuing at page 227 of the record)

Q. So one of the reasons you're building the highway — you're not building it because you need the additional roads for more cars; is that what you're saying?

A. We're saying, yes, sir, that we would have a safer facility by building it.

Q. But you don't need it because you have more cars. You will have more trips down the road; is that correct?

A. Yes, sir.

Q. You do agree that the farmers grow cotton right up and down the road; is that correct?

A. Yes.

Q. And the more trips, the more sulfuric acid comes out of the back of the cars?

A. Yes, sir.
Q. Will you agree that cotton and sulfuric acid don't mix?
A. I don't know about cotton and sulfuric acid.
Q. Do you know whether or not farmers are paid for cotton based upon its color, being a part of the grade, and staple, and the length of the staple, do you know that?

(Continuing on page 228 of the record)

A. I read about these things in the paper. To what degree, I do not know.
Q. That's common knowledge?
A. Yes, sir.
Q. If the grade is not as good you don't get as much money for it?
A. Yes.
Q. Has the Highway Department run any studies at all to determine what effect widening the highway may have on the crops growing up and down the sides of the road?
A. Well, we have the crops growing up and down the side of the road now without injury from the traffic and we are getting catalytic converters now. As a matter of fact, the emissions of the cars that are produced today do have catalytic converters and we do not hear about any damages, at any rate, or see any or know of any.
Q. How do you know you don't have any damages? Have you run any tests or studies?
A. No, sir."

On page 4 of the opposition brief the State characterizes as being an "outrageous factual inaccuracy is the assertion that the EIS contains no discussion of the 'do nothing' alternative and the absence of such discussion is undisputed. This proposition was vigorously disputed. The EIS does contain discussion of the 'do

nothing' alternative . . ."

Petitioners again would show this Honorable Court that George C. Wall, Jr. the gentleman in charge of the overall project and who is responsible therefor, testified about the lack of discussion of the "do nothing" alternative. It is and has been petitioner's petition that the gentleman in charge of the project who signed the environmental impact statement (EIS), speaks with authority and respondents are bound by his testimony. Respondents have made no effort to impeach this witness. Mr. Wall testified regarding the "do nothing" alternative in several places beginning at page 221 of the record below, at line 9:

"Q. That do nothing alternative?

A. Yes, sir.

Q. In the Impact Statement that we're talking about here, is it not a fact that one of the comments was there was no discussion of the do nothing alternative?

A. I believe that is correct.

Q. Was that ever rectified in the comments of the Highway?

A. I'd have to review the Impact Statement."

(Continuing with Mr. Walls testimony at page 222 of the record line 5)

Q. Without doing that, you don't have any recollection at this time of any specific comments addressing itself to the do nothing alternative, do you?

A. I do know that we did consider the do nothing alternative.

Q. "We" meaning the Highway Department?

A. Yes, sir."

Mr. Wall makes the following revealing statement concerning the lack of any discussion of the "do nothing" alternative at page 245, beginning line 9:

"Q. Is there any discussion in the Impact Statement about the impact on the environment of leaving the road in it's current condition of disrepair as you described it and leaking, is there any discussion about what effect that will have on the problem?

A. I do not recall anything being in the Environmental Statement about that, about those specific things. I do recall in the Environmental Statement that we say that the road is rough."

At page 278 of the record beginning with line 1 Mr. Wall's testimony continues concerning the lack of discussion on the "do nothing" alternative as follows:

"Q. All right, does that not appear to be a copy of the letter on the letterhead of the United States Department of Interior, Office of the Secretary, Southwest Region, dated September 12, 1972?

A. It does.

Q. Is that a response from the Department of Interior commenting on that Impact Statement?

A. Yes, sir, it is.

Q. That's what it is?

A. It is.

Q. Would you look over to the last page of that letter on page 41 and read along with me there where it says number three and if I make a mistake, please correct me.

It states: "Alternative to the proposed highway improvement. As presented, the draft statement merely justifies 'building a highway.'

There is no mention of the 'do nothing' alternative, but no related discussion."

Is that accurate?

A. That's accurate.

Q. Essentially is that still the condition of this

Impact Statement?

(Continuing page 279 of the record)

A. The — plus the testimony that has been given here today."

The respondents did not offer any further discussion of the "do nothing" alternative in the EIS.

The State of Texas continues at page 5 of the opposition brief asserting to this Honorable Court that another factual inaccuracy in petitioners statement is the characterization of some property crossed as "wetlands" with the following statement "but if the reference is intended to apply to the property that was discussed in greatest detail in the Trial Court, then it is far afield because the evidence was that Callahan Draw is usually dry. (Finding of Fact No. 27, Petition Appendix B-4)."

The State of Texas distorts the true facts in its own favor and once again makes statements about the Petition for Writ of Certiorari that are distorted and misleading. The evidence and fact finding by the Trial Court (No. 27), was in fact that Calahan Draw was usually dry. An examination of petitioners Petition for Writ Certiorari at page 5 reveals that the allegation is that "Playa lakes" *may* be wetlands and not that Calahan Draw is a wetland. Concerning water and it's retention in Playa lakes petitioner testified at page 101 and 102 as follows beginning at line 25:

"Q. I believe earlier in your testimony you mentioned something about having straightened a stream, is that correct? Did you straighten a stream on your property at any time?

THE COURT: Calahan Draw?

A. (By the Witness) No, I didn't straighten the stream. I followed the course of the stream.

THE COURT: Cleaned it out?

THE WITNESS: And cleaned out the playa lake so I could accumulate the water for irrigation purposes so as to help not use the Ogallala."

Petitioners respectfully submit to the court that they have not misstated or misrepresented facts concerning the trial below to this Court. It is unfortunate that counsel for respondents would engage in such a tactic as to urge to this Court that petitioners would misrepresent the facts. Petitioners are prepared to submit an abstract or the entire transcript for the Court's consideration to further substantiate the factual matters set forth herein should it be required.

WHEREFORE, Respectfully Submitted, petitioners again pray this Honorable Court to grant the Petition for Writ of Certiorari for the reasons herein stated and those herefore stated in the Petition for Writ of Certiorari to review the decision in the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the above and foregoing reply to the opposition brief of the State of Texas have this day been served upon the counsel for the respondents by depositing same in the United States mail, with sufficient postage affixed addressed as follows:

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Dated and signed this 25th day of June, 1981, at Amarillo, Texas.

Philip R. Russ